

## Ninth Circuit Hears Oral Argument in Gender Bias Case

Article By:

Stephanie L. Adler-Paindiris

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Whether a gender bias case can proceed as a class action is the question the U.S. Court of Appeals for the Ninth Circuit, in San Francisco, will decide.

The Court heard oral argument in *Moussouris v. Microsoft Corp.* on November 4. Katherine Moussouris appealed from the District Court's denial of class certification in the gender discrimination action. U.S. District Judge James Robart of the Western District of Washington held that the proposed putative class members were not shown to be victims of a standard companywide policy. To the contrary, his order from June 25, 2018, holds:

Plaintiffs challenge Microsoft's policy of allowing discretion by lower-level managers but have not identified a common mode of exercising discretion that pervades the entire company. As in *Dukes*, without some common direction, it is "quite unbelievable" that all Microsoft managers supervising over 8,600 putative class members "would exercise their discretion in a common way."

The three-judge panel that heard the oral argument on appeal consisted of Circuit Judges Richard Paez and Johnnie Rawlinson and District Judge Leslie Kobayashi (sitting by designation). Moussouris's counsel argued the District Court erred in denying class certification, claiming that women were locked into lower pay bands than men, and therefore often were paid less than their male counterparts even where they performed at an equal or higher level. Moussouris's counsel also argued that employees were placed into peer groups composed of employees with similar skillsets, that each peer group had two pay bands, and that women were disproportionately concentrated in the lower pay bands of each peer group.

The judges, particularly Judge Rawlinson, repeatedly queried Moussouris's counsel to point out the specific Microsoft corporate policy that allowed women to be placed in lower pay bands than men. Judge Paez also asked Moussouris's counsel for the specific factors that were taken into consideration when evaluating members of each peer group, and whether these evaluations were discretionary. Moussouris's counsel replied that while there was managerial discretion in evaluating employee performance, managers were restricted by the pay bands that employees were already locked into under corporate policy when determining how much to pay them. Judge Rawlinson repeatedly stated that she was "having a disconnect" because while she didn't "necessarily disagree that the statistics are there, [] *Dukes* tells us that there has to be a policy that has resulted in that disparity that we can say applies across the board to every decision that's made." Despite asking several times to point to the specific policy Moussouris was challenging, her counsel did not

appear to convince Judge Rawlinson of any specific policy in the record.

Counsel for Microsoft argued that, rather than a corporate policy in place, all decisions were made according to a calibration process in which managers would use their discretion to assess an employee's relative contributions. Microsoft's counsel argued that Moussouris's own expert noted that these calibrations were extraordinarily varied and involved extensive managerial discretion. Microsoft's counsel also pointed out that the alleged policy at issue seemed to change over time and that the current theory espoused by Mourssouris's counsel was first introduced to the lower court at the hearing on her Motion for Certification and that the record lacked support for what Microsoft argued was the new theory of the putative class. Moreover, Microsoft's counsel reiterated the difficult standard Moussouris was required to overcome on appeal: a clear abuse of discretion by the District Court in applying the Rule 23 criteria, and that Judge Robart's decision contained neither an error of law or fact and that he did not abuse his discretion.

The questioning suggested that, without pinpointing a precise companywide policy that perpetuated discrimination, overturning the denial of class certification will be difficult. As this case relied heavily on the *Dukes* decision, we will be watching to determine whether the 9<sup>th</sup> Circuit differentiates this case from *Dukes* or follows Justice Scalia's opinion.

*Co-Authored by Arlen Gharibian*

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National Law Review, Volume IX, Number 309

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